90-67

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

RAY C. BUCKNER,

Petitioner,

vs.

CITY OF HIGHLAND PARK; HIGHLAND PARK POLICE DEPARTMENT; ROBERT BLACKWELL; TERRY FORD, Chief of Police; and JOHN HOLLOWAY, Lieutenant, Jointly and Severally,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED[1]

A. WHETHER THE COURT OF APPEALS DECISION IN THIS MATTER CONFLICTS WITH THIS COURT'S DECISION IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 US 532 (1985)?

B. WHETHER THERE IS A CONFLICT BETWEEN THE CASE OF *GARRITY V. NEW JERSEY*, 385 US 493 (1967) WHICH ALLOWS A MUNICIPALITY CHARGING A POLICE OFFICER WITH A CRIME TO TAKE A STATEMENT FROM THE OFFICER WITHOUT VIOLATING THE FIFTH AMENDMENT ONLY WHEN THE OFFICER IS ASSURED HIS OR HER JOB IS NOT THREATENED, AND THE *LOUDERMILL* CASE MENTIONED HEREINBEFORE WHICH REQUIRES A MUNICIPALITY TO ENGAGE IN A PRE-TERMINATION HEARING BEFORE DISCHARGING SUCH A POLICE OFFICER?

C. WHETHER A POLICE OFFICER WHO IS ADMITTED TO THE HOSPITAL FOR TREATMENT OF PSYCHOLOGICAL PROBLEMS DURING THE TIME HE IS AFFORDED HIS PRE-TERMINATION HEARING HAS IN FACT BEEN GRANTED HIS RIGHTS UNDER *LOUDERMILL*?

D. WHETHER A UNION REPRESENTATIVE ASKING A UNION MEMBER FOR HIS OR HER STATEMENT IS ENOUGH FOR THE EMPLOYER TO FULFILL ITS DUTY UNDER *LOUDERMILL*?

[1] All parties to the proceeding in the court below are listed in the caption.

E. WHETHER ON THE FACTS PRESENTED HERE — i.e., AN OFFICER WHO IS IN THE HOSPITAL FOR PSYCHOLOGICAL TREATMENT; WHO IS UNDERGOING CRIMINAL INVESTIGATION FOR THE ACTIVITIES FOR WHICH HE IS DISCHARGED; and WHOSE ONLY CONTACT ONCE ADMITTED TO THE HOSPITAL WITH THE CITY (IF ANY) WAS THROUGH A UNION REPRESENTATIVE — THE *LOUDERMILL* STANDARDS WERE MET?

F. WHETHER WHEN A CITY HAS IN PLACE, A PROCEDURE FOR REMOVING AN OFFICER FROM DUTY WHO IS UNDERGOING PSYCHOLOGICAL PROBLEMS, THE *LOUDERMILL* BALANCING TEST INVOLVING QUICKLY REMOVING AN UNSATISFACTORY EMPLOYEE IS APPLICABLE?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ray Buckner petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

Attached as Appendix A is the Trial Court's First Memorandum Opinion and Order in this case. (App. p. 1a) Appendix C is the Trial Court's opinion denying rehearing. (App. p. 31a) The Court subsequently ordered an amount of back pay and attorneys fees. The Court of Appeals decision at Appendix B is the other opinion that is relevant here. (App. p. 19a)

Neither relevant opinion is published.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on April 10, 1990. No motion for rehearing has been made and this court's jurisdiction is invoked pursuant to 28 USC 1254(1).

STATUTES INVOLVED

42 USC 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state of territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Fifth Amendment to the United States Constitution says in pertinent part "no person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Plaintiff, Ray C. Buckner, was discharged from his employment as a police detective for the City of Highland Park on November 15, 1984. He was a 20-year employee but on November 7, 1984, he had been accused by a citizen of Highland Park of making improper and unwanted sexual advances toward her while he was attempting to take a witness statement from her.

Buckner admitted himself to Henry Ford Hospital's psychiatric wing in Detroit on November 8, 1984. The records from that hospitalization show that he was dealing with ethanol abuse, depression, and specific traumas that had occurred in his life, including years before, the death of a young child. Plaintiff had been drinking heavily for years and his continuing to drink, despite the fact that the Chief of Police had warned him about his drinking, drove him to voluntary hospitalization on November 8, 1984.

He admitted himself around 2:00 p.m. after another day of drinking and about 6:30 p.m. that evening, Lieutenant John Holloway of the Highland Park Police Department came to the hospital. Mr. Buckner was advised tht he was the subject of a criminal investigation at that time and was given his Miranda rights. *Miranda v. Arizona*, 384 US 346 (1966). Plaintiff refused to give a statement and was suspended from the force with pay at that point.

Plaintiff was then admitted to the hospital and remained hospitalized for 3 to 4 weeks.

During that 3-4-week period, Plaintiff's union President — Officer Brookman — visited the Plaintiff. There is a factual dispute present as to when Officer Brookman visited Plaintiff. Plaintiff has stated under oath that the visit was subsequent to the November 15, 1984 discharge. Brookman has stated under oath that the visit was prior to the November 15, 1984 discharge.

There is, however, no dispute that Brookman's visit to the Plaintiff was as his union representatitve to get him to sign a grievance pursuant to the Collective Bargaining Agreement.

The Court of Appeals found that the issue of when Brookman visited was resolved by an affidavit filed by Defendant in this matter on March 25, 1988, or thereafter, after the trial court

first granted summary judgment to Plaintiff, and in support of the motion for rehearing. Brookman, however, in that affidavit makes it even more clear that he was visiting Mr. Buckner as a union representative to file a written grievance on Buckner's behalf. Brookman says that he met with the Chief of Police on at least three occasions and was advised of the charges against Buckner and told that the Chief intended to terminate Buckner unless a defense was submitted. The criminal investigation was ongoing however and Brookman's affidavits make it clear that he was speaking to Buckner as his union representative in order to get a grievance filed.

The District Court found that the pre-termination proceedings relied upon by the Defendant here were inadequate. In its March 22, 1988 decision, the Court found that:

> "Detective Buckner was denied any meaningful opportunity to respond to the accusations against him prior to his discharge on November 16, 1984, eight days after the alleged incident giving rise to his dismissal." (App.A, pp. 7a-8a)

The Court goes on to write:

> "The Court finds that on the undisputed facts Plaintiff had at most one opportunity to respond to Riley's [the complaining citizen of Highland Park] charges, i.e., when Lieutenant Holloway and Officer Yopp visited him on November 8th at the hospital, only hours after Buckner had been admitted.
>
> The record indisputedly reflects that this single visit on November 8th was not a constitutionally adequate reasonable opportunity for Buckner to provide an explanation or otherwise respond. Not only was Buckner advised during the visit by Officer Yopp, his union representative, not to make a statement at that time, but more importantly, the record shows

> that Lieutenant Holloway advised Plaintiff of his Miranda Rights and informed him that he was the subject of a criminal investigation. Under such circumstances Buckner's failure to respond immediately and his corresponding exercise of his constitutional right against self-incrimination may not be construed as a waiver of his right to file an explantion within a 'reasonable time' or otherwise be held against him." (App.A, p. 10a)

The facts were not in dispute as to the nature of Lieutenant Holloway's visit to Plaintiff in the hospital. Holloway testified that it was a criminal inviestigation. Lieutenant Holloway asked Plaintiff to sign a Miranda form and marked at the top of the form, or had marked there, that Buckner was "unable to sign". Thus, this initial "hearing" involved telling Plaintiff that anything he said could be used against him in a criminal proceeding while he was hospitalized for his psychological and psychiatric care.

The Court of Appeals finds that the case of *Garrity v. New Jersey*, 385 US 493 (1967) is inapplicable here because Buckner was not threatened with discharge for refusing to make a statement regarding the incident. In fact, Buckner was not threatened with discharge by anybody in the command structure at Highland Park.

Instead, he faced a "Hobson's Choice" — either make a statement with which he might incriminate himself and subject himself to criminal sanctions; or fail to make a statement and be found later to have waived in effect his *Loudermill* right to a pre-termination hearing.

The District Court also found in its initial decision that Officer Brookman had not in fact visited Plaintiff prior to Plaintiff's discharge, based on Plaintiff's testimony and Brookman's initial affidavit which confirmed Plaintiff's testimony.

On rehearing, the District Court found that the Officer Brookman alleged visit was in fact, irrrelevant because Brookman was a union representative. Brookman's first affidavit made it clear that had he been visiting the Plaintiff as an agent of the employer, that would be a violation of his union duties for which he could be severely criticized at the very least by his union membership.

With regard to Brookman's visit or alleged visit to the Plaintiff, the trial court found:

> "He, the union representative, apparently says that he was sent by the Chief of Police or that he went and discussed the Plaintiff's case with him while Plaintiff was lying committed with depression and alcohol abuse problems in the psychiatric ward of the hospital.
>
> But the court was well aware and was not misled by anything concerning the visit of the union representative. The visit of the union representative even under the new defense affidavit which has been submitted, cannot satisfy the constitutional obligation of the employer.
>
> If the employer asked the union representative to go and visit the Plaintiff in the hospital, the union representative nevertheless could not present himself as a representative of the employer and did not do so when he spoke with the Plaintiff; his obligation was to represent the Plaintiff as against this employer and not represent the employer as an adverse party to the Plaintiff.
>
> His visit, therefore, and any request he might have made for explanations certainly was not made on behalf of the employer and could not pretend to the Plaintiff to be an opportunity provided by the em-

ployer to respond to charges made against him to give his explanation of what he had done wrong or not wrong.

The new affidavit does not dispute the first affidavit paragraph four, which states that it was his duty as a union officer and never as an agent of the City to contact the Plaintiff, and that 'my only conversation with Chief Ford that I recall had to do with my getting the grievance form signed.'

He does not dispute either paragraph six which states that even had such a request been made by management to represent the City as against the Plaintiff, he would have been violating his duty as a union official and subjecting hismelf and the union to liability if he had presumed to represent the City and not the Plaintiff City employee.

The union visit therefore is of no significance in this motion. This whole aspect of the argument presents no palpable defect by which the court would have been misled or which would have led to any different results." (Trans. of Reconsideration Hearing, May 23, 1988 — See App.C, pp. 32a-33a)

The Court of Appeals reversed relying on the Holloway hospital visit and the alleged Brookman visit. It states as follows:

"The minimal requirements of that opportunity [to be heard prior to termination] are viewed in terms of the balance between the interest of the government and the interest of the employee. Here, the employee is a police officer charged with the protection of the citizens of Highland Park. The government interest in effective law enforcement is extremely high and the need to speedily replace public

> safety officers who abuse their authority is obvious. Requiring the City to provide an elaborate pre-termination process hampers its 'interest in quickly removing an unsatisfactory employee.' Citing *Loudermill* @ Pg. 546. In view of this strong interest, Buckner's interest in retaining his job was adequately protected by the initial procedures which indicated that a mistake in termination was not being made. Moreover the opportunity for a post-termination proceeding under the Collective Bargaining Agreement provided Buckner with the opportunity to challenge his termination in a more detailed fashion.
>
> We therefore hold that the City of Highland Park afforded Officer Buckner the minimal due process he was entitled under *Loudermill*." (App.B, pp. 29a-30a)

Accordingly, the Court of Appeals reversed and remanded for entry of judgment in favor of the City and the other Defendants.

The jurisdiction of the Court in the first instance was 42 USC 1983 as well as the Fifth and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

This case presents at least one question which is likely to arise again and which requires this Court's attention. That is, in the course of the criminal investigation against a police officer who has *Garrity* rights, may the officer refuse to provide a statement based on the *Miranda* case and still preserve his right to a *Loudermill* pre-termination hearing at some later date.

In the case at bar, there is no dispute that the Plaintiff was

hospitalized for approximately a month, during which time the criminal action was proceeding, and during which time he was discharged. No criminal prosecution followed, apparently due to an exercise of prosecutorial discretion and/or analysis of the character of the evidence against the Plaintiff.

Plaintiff is therefore asking the court to decide that he should have had a pre-termination hearing at some point where his statement would not have potentially jeoparized him under the criminal law.

Secondly, the Court of Appeals and Judge Taylor obviously disagreed over what constitutes a meaningful opportunity to respond. *Daniels v. Williams* 474 US 327 (1986). In the case at bar, besides the conflict with the criminal investigation, the Plaintiff was in a psychiatric ward. He, after coming out of the psychiatric ward, went to Alcoholics Anonymous and through other kinds of treatment for some time. He simply could not have given a meaningful response with regard to these charges — or at the very least it is arguable that he could not until he took care of his own personal problems.

Thirdly, the Court of Appeals wrongly applies the weighing test of *Loudermill*. An officer with 20 years experience has a strong property interest in his job. It is also true that a city has a strong interest in maintaining an effective police force as the court points out.

However, in the case at bar, the Plaintiff was already hospitalized. Had he not been discharged, he would have exercised his option to go on sick leave until such time as his illness was resolved. At the point he would want to return to work would be the appropriate time for the City of Highland Park to conduct any sort of pre-termination hearing. The City instead argues that it attempted to get a statement or statements from the Plaintiff while he was hospitalized. Since he

was not working and could easily have been put on a sick leave, the city's interest in removing quickly an unsatisfactory employee is minimal here.

Fourth, Brookman makes it clear in both of his affidavits that he approached Plaintiff as a union representative. He was attempting to get Plaintiff to file a grievance. The grievance in this matter merely says that the discharge itself was unfair. (This would seem to indicate that Brookman saw Plaintiff after the discharge). The grievance simply says that Buckner categorically denies each and every allegation and requests that the grievance be held in abeyance until criminal charges have been cleared.

The Court of Appeals also relied heavily on the post-termination proceedings as one of its rationales in deciding this case should be dismissed. However, absent any pre-termination proceedings, it is clear that the post-termination proceedings would not meet the *Loudermill* standards.

If Brookman did visit Plaintiff prior to Plaintiff's discharge, it was merely to get his signature on a grievance. While *Loudermill* may not require an "elaborate" pre-termination procedure, Plaintiff in this case is not asking for an "elaborate" proceeding. He is merely arguing that to suggest that a criminal investigation interrogation effort is an opportunity under *Loudermill* flies in the face of *Garrity* and *Miranda*, and that any subsequent discussions with his union representative were certainly not adequate under *Loudermill*, either because the union representative was not an agent of the employer or because of the ongoing criminal investigation or because Plaintiff was ill.

To hold as the Sixth Circuit has here would suggest that any grievance filed by any employee over a discharge is enough to satisfy the *Loudermill* pre-termination hearing standard.

Grievances are notoriously brief, often simply saying something like "the discharge was not for just cause". Further the grievance procedure is in the control of the union — not the Plaintiff. In this particular instance, Officer Brookman controlled what the grievance said and allegedly spoke to Buckner about it. What Brookman relayed to the employer was not under Buckner's control. Since Brookman was not an agent of the employer and simply could not be, this cannot therefore be adequate under *Loudermill* standards.

CONCLUSION

Petitioner requests that his Petition for a Writ be granted.

Respectfully submitted,

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July 9, 1990

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RAY C. BUCKNER,

Plaintiff,

vs. Civil No. 86-71300

CITY OF HIGHLAND PARK, HIGHLAND PARK POLICE DEPARTMENT, ROBERT BLACKWELL, CHIEF OF POLICE, TERRY FORD, and LIEUTENANT JOHN HOLLOWAY,

Defendants.

MEMORANDUM OPINION AND ORDER

This case is before the court on the parties' renewed cross motions for summary judgment, filed pursuant to an order of this court, on plaintiff's claim that he was deprived of the due process of law guaranteed by the Fourteenth Amendment of the United States Constitution, when he was discharged from the police force of the City of Highland Park, Michigan, on November 15, 1984. Plaintiff's claim, filed pursuant to 42 U.S.C. § 1983, is that his discharge was made without adequate notice and opportuity to respond to the allegations which formed the basis for his dismissal.

I.

Plaintiff Ray C. Buckner was employed by the Highland Park Police Department for two decades. The terms and conditions of his employment were defined by a collective bargaining agreement (CBA) between the city and his union, the Highland Park Police Officers Association.

On November 6, 1984, then-Detective Buckner went to the home of Ms. Letite Riley in order to take her statement regarding an incident in which an individual had fired a gun at her. Buckner had failed to bring the proper witness form, so he informed Ms. Riley that he would return the following day for her written statement.

Buckner returned to Riley's apartment on the evening of November 7. In a complaint filed by Riley that same night, it was alleged that at that time Buckner made sexual advances toward her, touching her breast and attempting to kiss her, and that he refused to leave despite her repeated requests. Riley's boyfriend, Lawrence Bohler, who telephoned her while Buckner was at the apartment, corroborated Riley's story, stating that he could hear Buckner and Riley arguing as she repeatedly asked Buckner to leave. Both Riley and Bohler gave written statements to Highland Park Police Chief Terry Ford.

On November 8, at about 2:00 p.m., after learning that a complaint had been lodged against him, Buckner admitted himself to the psychiatric ward of Henry Ford Hospital for the purpose of obtaining treatment for alcoholism. That same evening, at about 6:30 p.m., Lt. John Holloway and plaintiff's union representative, Officer Hubert Yopp, visited upon Buckner in the hospital ward.

Defense affidavits state that Detective Buckner was then informed of the charges against him by Ms. Riley, and that he was ad-

vised of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 346 (1966)); and that he was asked but refused to give a statement, at which point he was suspended by Lt. Holloway.

Defendants further state that Chief Ford, at some later date, sent plaintiff's union president, Officer Charles Brookman, to obtain Buckner's account of the incident, and that plaintiff refused to give a statement to Officer Brookman as well.

Plaintiff has sworn that he refused to make a statement to Lt. Holloway on November 8 upon the advice of his union representative, Officer Yopp, who accompanied the lieutenant. Plaintiff further avers that Officer Brookman's subsequent visit occurred approximately ten days *after* plaintiff's initial hospitalization and *after* he had already been terminated from the force.

Plaintiff was fired on November 15, 1984, when Highland Park Mayor Robert Blackwell approved a letter of recommendation by Chief Ford of that same date. Plaintiff's termination became effective the following day.

On November 26, 1984, plaintiff filed a grievance pursuant to the provisions of the CBA between his union and the city. Due to multiple adjournments, arbitration of the dispute still had not been conducted at the time of hearing on these motions for summary judgment.

II.

Plaintiff filed a two-count complaint on March 10, 1986 in Wayne County Circuit Court (*Buckner v. City of Highland Park, et al.*, No. 86-606-587-CZ) alleging his discharge was in violation of his due process rights because no hearing was held prior to his termination, and further that the discharge violated the Michigan Civil Rights Act, MCLA § 37.2101 *et seq.* (Handicappers Act) because plaintiff is an alcoholic and was discharged because of that condition. The cause was removed to this court by defendants on March 31, 1986.

Following cross motions for summary judgment and a hearing, this court issued an Order on May 26, 1987, granting defendants' motion for summary judgment on the Handicappers Act claim, and denying both parties' summary judgment motions on the claim of deprivation of due process.

One month later, on June 26, 1987, this court ordered the parties to rebrief and reargue their summary judgment motions on the due process claim "in light of the Sixth Circuit's recent opinion in *Duchesne v. Williams, et al.*, slip opinion #86 1017 (June 16, 1987)." In its Order, the court further directed the parties to "specifically address the unresolved issue of the source of plaintiff's alleged property right in his employment which would implicate the due process requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)." The first motions had not touched upon the source of plaintiff's claim of property in his job.

This memorandum constitutes the court's finding of fact and conclusions of law on the matter.

III.

In order to state a claim for deprivation of due process of law in a discharge context, plaintiff must first demonstrate a property interest in his employment. *See Cleveland Board of Education v. Loudermill, supra*, at 538. If plaintiff demonstrates such a right, the state may not deprive him of his property without the due process of law. *Id.* at 538, citing *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (other citation omitted).

Defendants here have stated that, "for purposes of this motion," they do not dispute plaintiff's claim of a property interest in the position of detective, Highland Park Police Department. Nonetheless, a review here of the undisputed sources of plaintiff's property right is appropriate.

In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Supreme Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In *Loudermill, supra*, the Supreme Court specifically affirmed that a security guard and a school bus mechanic had property interests in their job by virtue of an Ohio statute, Ohio Rev. Code Ann. § 124.ll (1984), defining them as " 'classified civil service employees' . . . entitled to retain their positions 'during good behavior and efficient service; who could not be dismissed 'except . . . for . . . misfeasance, malfeasance or nonfeasance in office,' § 124.34." *Id.*, at 538-39. As the *Loudermill* Court put it: "The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment." *Id.*, at 539.

In the instant case, plaintiff has established beyond doubt that he has a similar property interest in continued employment with the Highland Park Police Department.

The collective bargaining agreement governing employees of the Highland Park Police Department provides that employees may not be disciplined or discharged without just cause, providing a five-step grievance procedure culminating in arbitration.

Moreover, as in *Loudermill*, plaintiff's property interest is further grounded in state law, pursuant to the Charter of the City of Highland Park and the Michigan Civil Service statute governing police officers.

Section 7-9 of the City Charter governs the police department and states at 7-9(4):

> The plan of Civil Service for policemen and firemen as established by Act #78 of the Public Acts of 1935, as amended, (MCL 38.501 *et seq.*), which was in effect in the City on the effective date of this Charter, is hereby continued under this Charter and incorporated therein by reference with all future amendments, with the same force and effect as though fully set forth, therein, and nothing is hereby added to or deleted from such Act by such incorporation.

The Michigan Civil Service act governing police and fire personnel, MCL 38.501 *et seq.*, commonly known as the Firemen's and Policemen's Civil Service Act, provides in § 13 (MCL 38.513):

> In all cases of . . . suspension of an employee or subordinate, whether appointed for a definite term or otherwise the appointing authority shall furnish such employees or subordinate with a copy of reasons for . . . suspension and his reasons for the same, and give such employee or subordinate a reasonable time in which to make and file an explanation . . . Provided, however, that the employee or subordinate shall be entitled to a hearing before the commission as provided in §14.

This provision permits a suspension for up to 30 days, and contemplates that the hearing to which the employee is entitled be held during that 30 day period.

§ 14 of the Act (MCL 38.514) provides in relevant part:

> . . . [H]owever, no member of any fire or police department within the terms of the Act shall be removed, discharged, reduced in rank or pay, suspended or otherwise punished except for cause, and

> in no event until he shall have been furnished with a written statement of the charges and the reasons for such actions, and all charges shall be void unless filed within 90 days of the date of the violations . . .

Thus, this court finds that plaintiff's property interest in continued employment arises from his CBA, the City Charter and the state Civil Service law.

IV.

The court must also determine whether plaintiff was deprived of his property without due process of law. After consideration, this court finds that the pretermination procedures provided to Detective Buckner failed to satisfy the minimum constitutional requirements of the due process clause.

Both the due process clause of the Fourteenth Amendment and Michigan Civil Service law require that a public employee such as plaintiff be given a reasonable opportunity to respond to charges leading to dismissal.

In *Loudermill*, *supra*, the Supreme Court stated:

> Some opportunity for the employee to present his side of the case is recurringly of obvious value in an accurate decision. Dismissals for cause often involve factual disputes. (citation omitted). Even where the facts are clear, the appropriateness or necessity of the discharge may not be. In such cases the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before termination takes effect. (citations omitted).

Id. at 543.

Detective Buckner was denied any meaningful opportunity to respond to the accusations against him prior to his discharge

on November 16, 1984, eight days after the alleged incident giving rise to his dismissal.

First, the Firemen and Policemen's Civil Service Act requires that any suspended officer must be given a written statement of the charges against him. MCL § 38.514, *supra*.

The court finds that plaintiff was denied his statutory right to such a "written statement." The uncontroverted evidence shows only that Buckner was allowed to read a copy of Letite Riley's complaint, against him on the the day he was hospitalized. Buckner was not given any clear idea, either on that day or at any other time prior to his termination on November 15, of the actual charges that the police department was contemplating as a result of Riley's complaint. Indeed, Buckner was told that he was suspended "pending investigation of possible criminal charges", and advised of *Miranda* rights. Nor was he given a reasonable time to make and file an explanation.

The Michigan courts have held that the purpose of the Firemen and Policemen's Civil Service Act is to provide job security and to protect officers and employees from arbitrary and unjust removal. *See Konyha v. Mount Clemens Civil Service Commission*, 393 Mich 422 (1975); *Day v. Gerds*, 54 Mich App 547 (1974). As part of that protection, the statutory language clearly contemplates that the "written statement" should provide more notice than simply a complainant's allegations, since § 14 states that prior to discharge, the officer shall receive a "written statement of the charges *and* the reasons for such action." MCL § 38.514 (emphasis added).

While the Michigan courts have stated that, in certain circumstances, "the charges and discipline may . . . be imposed by way of a single letter," *see Core v. City of Traverse City*, 89 Mich. App. 492 (1979), both the statute and the Michigan courts in *Traverse City* and other decisions, have made it clear

that such notice is adequate only where the plaintiff had a *reasonable* opportunity to make an explanation and is granted a fair hearing on the charges. As further discussed below, plaintiff was afforded no such opportunity.

Similarly, the Supreme Court has held that due process requires more than an unverified allegation before a plaintiff's property interest in continued employment may be properly terminated. In *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), the court referred to the "root requirement" of the due process clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." (emphasis in original).

"While the pretermination hearing need not definitively resolve the propriety of the discharge," the Court stated in *Loudermill*, "it should be an initial check against mistaken decisions — essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545. See *Bell v. Burson*, 402 U.S. 535, 540 (1971).

Even if the copy of Riley's complaint made available to Buckner on the day he was hospitalized satisfied the "written statement" requirement, the pretermination process afforded plaintiff was still constitutionally deficient since it is clear from the undisputed facts that plaintiff was not afforded a "meaningful opportunity" to respond.

The Michigan Civil Service statute requires that suspended employees must be given a "reasonable time in which to make and file an explanation" and be given a hearing before the hiring authority. See MCL § 38.518. In this case, plaintiff was suspended on the day he was admitted to the psychiatric ward of a hospital for alcoholism treatment, and he was fired eight days later while he was still hospitalized.

Defendants' assertion that plaintiff had "numerous opportunities" to respond during the eight day interval between his initial hospitalization and his dismissal must be rejected. The court finds that on the undisputed facts plaintiff had at most *one* opportunity to respond to Riley's charges, i.e., when Lt. Holloway and officer Yopp visited him on November 8 at the hospital, only hours after Buckner had been admitted.

The record indisputably reflects that this single visit on November 8 was *not* a constitutionally-adequate "reasonable opportunity" for Buckner to provide an explanation or otherwise respond. Not only was Buckner advised during the visit by Officer Yopp, his union representative, not to make a statement at that time, but more importantly, the record shows that Lt. Holloway advised plaintiff of his *Miranda* rights and informed him that he was the subject of a *criminal* investigation. Under such circumstances, Buckner's failure to respond immediately and his corresponding exercise of his constitutional right against self-incrimination may not be construed as a waiver of his right to file an explanation within a "reasonable time" or otherwise be held against him.

Defendants' assertion that plaintiff was given another opportunity to respond when he was visited by Officer Brookman, the union president, is not supported in the record. While Chief Ford claims he *requested* that Brookman visit Buckner in the hospital, plaintiff stated under oath in his deposition that Brookman had visited him in the hospital "about 10 days" after he was first hospitalized. Moreover, by affidavit, Officer Brookman has attested that he was *not* sent by Chief Ford to the hospital to obtain plaintiff's statement, and that even if he *had* visited plaintiff prior to his discharge, it would have been only in Brookman's capacity as union president. Brookman further testified that he was never told by Chief Ford or anyone else to advise Buckner of the police depart-

ment's intent to discipline him. Finally Brookman stated that he did not actually visit Buckner until Novemer 26, 1984, *after* plaintiff had already been dissmissed. Therefore, even if all city claims concerning Brookman are credited, he did not provide the requisite opportunity to plaintiff.

The defendants' assertion that the *post*-termination grievance and arbitration procedures provided under the CBA afforded plaintiff ample opportunity to defend his property interest misperceives the meaning of the Supreme Court's decision in *Board of Education v. Roth, supra; Boddie v. Connecticut, supra; Loudermill, supra*, and other cases in which the Court has interpreted the requirements of the due process clause in the context of a threatened property interest. These decisions emphasize that where fundamental rights such as the property interest in continued employment are at stake, the Fourteenth Amendment requires that reasonable precautions be taken to avoid erroneous deprivations *before* they occur.

As the *Loudermill* Court stated:

> The governmental interest in immediate terminaton does not outweigh [the employee's] interests . . . [A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays . . . Finally, in those situations where the employer perceive a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

Id. at 544-45. In this case, plaintiff could hardly have been deemed a significant hazard while hospitalized in the psychiatric ward of Henry Ford Hospital. In any event, defendants were authorized by the applicable Civil Service statute, MCL § 38.514, to suspend plaintiff for up to 30 days *without*

pay, before holding the hearing required by the statute, and defendants took such action. Defendants have failed to satisfy the statutory requirement because they denied plaintiff "reasonable time in which to make and file an explanation" and the "hearing before the commission as provided in § 14." See MCL § 38.513. Because plaintiff was denied these statutory protections, he did not have the meaningful opportunity to respond mandated both by the statute and the due process clause.

In determining that plaintiff was deprived of due process, the court emphasizes that it is not holding that plaintiff was necessarily entitled to a pretermination hearing, but only that he was entitled to a pretermination *opportunity to respond* that was meaningful and reasonable. *See Loudermill, supra*, at 543. And, of course, the court's holding expresses no view whatsoever as to the merits of either plaintiff's or defendants' claims on the underlying dispute in this case.

V.

In its order dated June 26, 1987, instructing the parties to rebrief and reargue their cross motions for summary judgment, the court indicated that it was doing so "in light of the Sixth Circuit's recent opinion in *Duchesne v. Williams, et al.*, slip opinion #86 1017 (June 16, 1987) . . ."

In determining the appropriate remedy for the deprivation of plaintiff's constitutional right to due process, this court is guided not only by *Loudermill* and other Supreme Court decisions, but also by *Duchesne*. There are two particular reasons why this court should take guidance from the *Duchesne* decision: first, because that action involved a substantially similar dispute as to the extent of constitutional due process requirements where a public official's property interest in his employment is at stake, and second, because the plaintiff here

seeks the same kind of relief as that ordered by the district court and upheld by the Sixth Circuit in *Duchesne*.

In *Duchesne*, the plaintiff brought an action charging deprivation of due process when he was fired as chief building inspector for a Detroit-area municipality by the city manager following a dispute. The district court found the plaintiff had a property right in continued employment with the city, and that he had been denied due process when he was discharged by the "appointing authority" (the city manager) after a hearing in which the city manager presided, developed the charges, testified extensively against the plaintiff, weighed the evidence and determined there was cause for plaintiff's dismissal.

The relevant statute in *Duchesne*, defining the process due to the public official when his property interest was at stake, states in part:

> . . . The building official shall be appointed by the chief appointing authority of the jurisdiction; and the building official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority.

MCL § 125.1504, as promulgated by Mich. Admin. Code Rules 408.30401. The district court found that plaintiff was denied a hearing comporting with the requirements of the statute.

In the instant case, plaintiff Buckner's property interest was similarly protected by statute, MCL § 38.513, providing that he be given a reasonable time to respond and a hearing within 30 days of any suspension. Both statutes have as their purpose the protection of employees from arbitrary and unjust removal from office, *see Konyha v. Mount Clements Civil Service Commission*, *supra*; *Day v. Gerds*, *supra*, and *Duchesne*, *supra*, slip opinion at 11. As discussed above, plaintiff was

denied the process which was his due under the constitution and the applicable Michigan statute.

The remedy approved by the district court in *Duchesne*, and affirmed by the Sixth Circuit, included (1) a new hearing before a mutually agreed-upon neutral hearing officer; (2) reinstatement of the plaintiff pending the rehearing and (3) back pay. In the instant case, the court need not order the first element of the *Duchesne* remedy, as there was no hearing, constitutionally adequate or otherwise, in the first place and because the parties have agreed to submit resolution of the merits of the underlying dispute to binding arbitration.

Plaintiff seeks an award of back pay until such time as some kind of constitutionally-adequate hearing is provided, together with reimbursement of lost benefits and pension monies withdrawn to supplement plaintiff's income after his dismissal.

With regard to back pay, the Sixth Circuit noted in *Duchesne* that "the *Loudermill* opinion is quite clear on what process is due, but not on what the appropriate remedy is for its denial," and stated that *Loudermill* could be read to mean either (1) that plaintiffs are entitled to new pre-termination hearings, with such ancillary relief, including reinstatement and back pay, as is necessary to preserve the statuts quo, *or* (2) that plaintiffs are entitled to only nominal damages for denial of a pre-termination hearing if the employer ultimately shows that the employee would have been dismissed after a fair hearing. *Id.*, slip opinion at 19.

While the *Duchesne* court cited decisions including *Carey v. Piphus*, 435 U.S. 247 (1978) and *Kendall v. Board of Education*, 627 F.2d 1 (6th Cir. 1980) suggesting that in some circumstances only nominal damages are appropriate, the court determined that *Carey* and *Kendall* were not directly applicable to *Duchesne*, because these pre-*Loudermill* cases "involved

plaintiffs who claimed a right to money damages for the deprivation of due process before they had proven any injury from that deprivation." *Duchesne*, *supra*, slip opinion at 18.

By contrast, the district court in *Duchesne* found that plaintiff had proven his injury resulting from his termination without a fair hearing. In this case, and for the reasons cited earlier in this opinion, the court finds on the demonstrated facts that Buckner has proven an injury in the deprivation of his property interest in continuing employment that is similar to that of the plaintiff in *Duchesne*.

Noting that *Loudermill* has been read both ways as to the issue of back pay, the Sixth Circuit in *Duchesne* concluded that "It has been more common . . . to read *Loudermill* as not only prescribing what process is due, but as altering the law on what relief a plaintiff is entitled to once a denial of due process is demonstrated," *id.*, slip opinion at 20, citing several decisions where back pay was awarded until such time as proper pre-terminaton hearings were conducted. (Citations omitted).

In affirming the award of back pay as part of the equitable remedy in *Duchesne*, the Sixth Circuit also cited with approval the discussion by Chief Judge Lay in *Hogue v. Clinton*, 791 F.2d 1318 (8th Cir.), *cert. denied*, 93 L.Ed. 2d 704 (1986) (dissent), in which he distinguished the liberty interest deprivation in *Hogue* from the property interest deprivation that formed the basis of the Court's due process decision in *Loudermill*, stating "[The *Loudermill*] rule clearly imposes on public employers an obligation to retain an employee on the payroll until a pretermination hearing satisfying the *Loudermill* notice and hearing requirement is conducted." *Duchesne*, *supra*, slip opinion at 22, quoting Chief Judge Lay in *Hogue v. Clinton*, *supra*, at 1328-29. As Judge Lay put it, "To effectively bar recovery of back pay damages . . . would make a mockery

of the requirement of a pretermination hearing since, without the deterrent of a back pay award, no incentive remains for the employer to do anything more than provide only a post-termination hearing."

Because the court finds on the undisputed facts that plaintiff had a property interest in continued employment, and that he was deprived of that interest without a meaningful opportunity to respond to the charges, in violation of his statutory and constitutional rights — under circumstances substantially similar to those in *Duchesne* — the court orders that plaintiff be awarded back pay for the period of time beginning on November 16, 1984, the date of the unlawful termination of his property interest until such time as he was given a meaningful opportunity to respond to the charges against him through binding arbitration or other fair hearing. Therefore, back pay and benefits are awarded until either the date of plaintiff's hearing, or the first date set for that hearing which was adjourned by plaintiff, and not defendant, whichever date is the earlier of the two.

The court emphasizes that this relief is appropriate given the procedural due process requirements outlined in *Loudermill, supra,* when a constitutionally-protected property interest is placed in risk. The court further notes that its award of back pay pending a constitutionally-adequate notice and opportunity to respond is based on the strong similarity on the facts and the law between this case and *Duchesne,* and the Sixth Circuit's approval of the remedy in that case.

Finally, this court emphasizes again that in awarding such relief, it expresses no view whatsoever on the merits of the underlying dispute leading to the unconstitutional deprivation. But it is the essence of the Court's ruling in *Loudermill* that the decision on the merits is a distinctly separate issue. As the Court in *Loudermill* stated "The right to a hearing does

not depend on a demonstration of certain success," and "governmental interests in immediate termination do not justify termination before a constitutionally sufficient hearing has been held." *Id.* at 544.

For the above reasons, plaintiff's motion for summary judgment is GRANTED, with an award of back pay as outlined above, and defendants' motion for summary judgment must be DENIED.

IT IS SO ORDERED.

/s/ Anna Diggs Taylor
Anna Diggs Taylor
United States District Judge

Date: MAR 22 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RAY C. BUCKNER,

Plaintiff,

vs. Civil No. 86-71300

CITY OF HIGHLAND PARK, HIGHLAND PARK POLICE DEPARTMENT, ROBERT BLACKWELL, CHIEF OF POLICE TERRY FORD, and LIEUTENANT JOHN HOLLOWAY,

Defendants.
_____/

JUDGMENT

This matter having come before the Court, and the Court having entered its Memorandum Opinion and Order; now, therefore,

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is GRANTED, and defendants' motion for summary judgment must be DENIED.

/s/ Anna Diggs Taylor
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

DATED: MAR 22 1988

APPENDIX B

Nos. 88-1404/1649, 89-1550
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAY C. BUCKNER, *Plaintiff-Appellee*, (88-1404 1649), *Cross-Appellant*, (89-1550)	)	
v.	)	
CITY OF HIGHLAND PARK; HIGHLAND PARK POLICE DEPARTMENT; ROBERT BLACKWELL; TERRY FORD, Chief of Police; JOHN HOLLOWAY, Lieutenant, Jointly and Severally, *Defendants-Appellants* (88-1404/1649), *Cross-Appellees* (89-1550).	)	ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed April 10, 1990

Before: MARTIN and BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Ray C. Buckner was a detective in the Highland Park, Michigan Police Department. On November 6, 1984, Buckner went to the apartment of Letit Riley to investigate her complaint against an individual for shooting at her. Buckner told Ms. Riley that he had forgotten the proper witness form and that he would return the next day for her written statement.

On the evening of November 7, 1984, Buckner returned to Ms. Riley's apartment and gave her a witness complaint form. While Ms. Riley filled out the form, Buckner interrogated her about her sexual activities. He then grabbed her arm, rub-

bed one of her breasts, and pulled her head toward him. Ms. Riley demanded that he leave her apartment, but Buckner refused. During this incident, Riley received a phone call from Lawrence Bohler. Riley told Bohler to remain on the line, and she continued her efforts to make Buckner leave her apartment. Through the receiver, Bohler heard Riley and Buckner arguing while she told him to leave. Riley finallly forced Buckner to leave and then informed Bohler about the incident. Bohler phoned the Highland Park Police Department and lodged a complaint regarding Buckner's conduct.

After receiving Bohler's complaint, Chief William Ford and the Lieutenant in Charge of Detectives, John Holloway, immediately went to Riley's apartment to investigate the allegations of Buckner's sexual misconduct. Riley and Bohler gave written statements to Chief Ford that night.

Early the next day, November 8, Buckner was contacted at his home by Officer Czarnecki, who told him about Ms. Riley's complaint. Buckner's first act, upon reporting to work that day, was to ask Officer Charles Brookman, the Chief Steward of Teamsters Local 129, which represented the Highland Park Officers, if he had heard anything regarding a complaint filed against him. Later that day, Buckner told Officer Larry Robinson that he had "messed with a woman" the night before and was in trouble. Later still, after learning that Chief Ford wished to discuss the complaint with him, Buckner fled to Henry Ford Hospital and claimed that he needed treatment for alcohol abuse. His medical records, however, show that he was never diagnosed as an alcoholic.

On the evening of November 8, Lt. Holloway went to the hospital to interview Buckner. Holloway was accompanied by a union representative, Officer Yopp, to ensure that Buckner's collective bargaining rights were protected. After meeting first with Yopp and then receiving a *Miranda* warning, Buckner

was questioned by Holloway and shown Mr. [sic] Riley's written complaint. Buckner refused to comment on the allegations in the complaint. Holloway, under the prior instructions of Chief Ford, suspended Buckner with pay pending further investigation of the charges in the complaint.

Chief Ford then requested that the union's Chief Steward, Officer Charles Brookman, advise Buckner of the charges against him and obtain Buckner's account of the Riley incident. Chief Ford told Brookman that he intended to discipline Buckner. Brookman visited Buckner at the hospital, but Buckner refused to make any statement regarding the incident.

On November 15, 1984, following eight days of investigation and attempts to obtain a statement from Buckner, Chief Ford made a preliminary determination and recommended to Highland Park Mayor Robert Blackwell that Buckner be discharged. Mayor Blackwell approved the discharge. A copy of the discharge was given to Officer Brookman as Buckner's Union Representative.

Pursuant to the collective bargaining agreement between the City of Highland Park and Teamsters Local 129, Buckner filed a written grievance on November 29, 1984 challenging his suspension and subsequent termination. In the grievance, Buckner generally denied the allegations in Chief Ford's recommendation letter and claimed that the City deprived him of procedural due process in the discharge.

On March 10, 1986, Buckner filed a lawsuit in Michigan state court alleging that his discharge violated his due process rights because no hearing was held prior to his termination and that the discharge violated the Michigan Civil Rights Act, M.C.L.A. § 37.2101, *et seq.*, because he is an alcoholic and was discharged because of that condition. The defendants removed this suit to federal district court. On May 26, 1987, the district

court granted summary judgment to the defendants on the pendent Michigan Civil Rights Claim but denied the parties' cross-motions for summary judgment on the due process claim.

On June 26, 1987, the district court requested the parties to re-brief and re-argue their due process claims. On March 22, 1988, after considering the briefs and arguments, the district court awarded summary judgment to Buckner. The district court found that Buckner had a property interest in his continued employment and that, despite the opportunities for Buckner to give his account of the incident, the pretermination procedures provided to Buckner insufficiently protected his due process rights under the requirements announced in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The district court's judgment was based, in part, on Officer Brookman's affidavit which stated that he did not visit Buckner until after the termination. This affidavit later proved to be incorrect in terms of the dates involved. The judgment was also based on the district court's analysis of the process due to Buckner under M.C.L. § 38.501, *et seq.*, also known as Act 78. Act 78 provides that Michigan municipalities, which adopt Act 78 as part of their charter, must give employees covered under that act, such as police officers, a written statement of the charges against them and the reasons for the city's actions, an opportunity to answer those charges, and a subsequent public hearing, pending which the employees shall remain in office. *See* M.C.L. § 38.514. After determining that Buckner's due process rights had been violated, the district court awarded Buckner back pay from November 16, 1984 under *Duchesne v. Williams*, 821 F.2d 1234 (6th Cir. 1987), *vacated and reversed*, 849 F.2d 1004 (6th Cir. 988) (*en banc*).

During the course of the district court proceedings, Buckner's grievance proceeded toward an arbitration hearing. In

January 1988, the hearing was held and on April 29, 1988, the arbitrator denied Buckner's grievance, finding that the City had "just cause" to discharge him. Contrary to the district court, the arbitrator found that Buckner had notice of the accusations and evidence against him and an opportunity to respond, meeting the due process standards announced in *Loudermill*.

On March 31, 1988, the City filed, under the Eastern District of Michigan's local rule 17(m), a motion asking the district court to reconsider the summary judgment. At the May 23, 1988 hearing on that motion, the City introduced a second affidvit by Officer Brookman, obtained only three days after the summary judgment ruling, indicating that Brookman visited Buckner prior to the termination. The City introduced evidence that Act 78 was not in effect in Highland Park at the time of the termination. The City also attempted to have the district court take notice of the arbitrator's decision. The court declined to reconsider its judgment, stating that Rule 17(m) requires a party to demonstrate both a palpable defect by which the court and the parties have been misled, and that a different dispositon of the case must result from the correction of that defect. The court acknowledged that Act 78 did not apply to the case, but upheld its opinion that the City had failed to meet the *Loudermill* standards. The court also stated that while Brookman's second affidavit may have changed the chronology of his visit, it still established that Brookman visited Buckner as a union representative, not as an agent of the city. The court noted the contrary findings of the arbitration decision, but did not further reconsider its judgment in light of that finding.

Subsequently, the district court awarded attorney's fees to Buckner's counsel as the prevailing party in this civil rights case.

The City of Highland Park contends that the district court erred by granting summary judgment to Buckner on his due process claim in view of the standards enunciated in *Loudermill*. We engage in a *de novo* review of the district court's grant of summary judgment. *Berlin v. Michigan Bell Tele. Co.*, 858 F.2d 1154, 1161 (6th Cir. 1988). Hence, we determine, in the light most favorable to the non-moving party, whether any genuine issue of material fact existed in the record below and whether Buckner was entitled to a judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Berlin*, 858 F.2d 1161; *Hand v. Central Transport*, 779 F.2d 8, 10 (6th Cir. 1985). The City of Highland Park does not dispute that Buckner had a property interest in his continued employment. The only factutal dispute concerned the evidence that Chief Ford sent Officer Brookman to visit Buckner before the termination and Officer Brookman's first affidavit which stated that he visited the hospital after the termination. At the hearing on the motion to reconsider, Officer Brookman's second affidavit revealed the mistake in his first affidavit and resolved the fractual dispute. However, the district court ruled that this dispute was not an issue of material fact because Brookman's visit as a union representative was not an opportunity for Buckner to make a statement that could suffice as an opportunity to be heard under *Loudermill*. Moreover, the court ruled that although Act 78 did not apply to the case, the *Loudermill* standards were not satisfied. Consequently, there is no genuine issue of material fact on the record before us and summary judgment is appropriate for the disposition of this case. Because Act 78 does not apply to this case and the collective bargaining agreement in force between the City and the police officers' union does not set out particular pretermination procedure, the question becomes whether, as a matter of law, the pretermination afforded to Buckner failed to provide the minimal protections secured by the due process clause of the Constitution.

The due process clause requires that, prior to termination, a public employee, with a property interest in his or her public employment, be given oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story to the employer. *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304, 310 (6th Cir. 1988), *on remand from*, *Loudermill*, 470 U.S. 532. An application of *Loudermill* requires us to balance the competing interests of the government in terminating an unsatisfactory employee and the employee in retaining his or her property right in a job. *Loudermill*, 470 U.S. at 546.

Loudermill established the minimal protections afforded to a public employee in a pretermination proceeding. The proceeding need not be elaborate. "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Id.* at 545 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). The subsequent full and formal post-terminaton proceedings provided to the discharged plaintiff under state law was a significant factor in the Court's analysis in *Loudermill*.

In this case, an elaborate system of post-termination hearings, culminating in a formal arbitration proceeding, was provided to Buckner under the collective bargaining agreement between the City and the Teamsters. The usual preterminaton process for discharging Highland Park police oficers involved a meeting between Chief Ford, the officer against whom discipline was considered, and a union representative, at which the formal charges were discussed and Chief Ford heard the officer's views. Because the usual department practices were not strictly followed, we analyze Buckner's termination process under the guidelines established in *Loudermill*.

Buckner was visited in the hospital during his alleged bout

with alcoholism and confronted with the charges against him by the union representative, Officer Yopp, and Lt. Holloway. Moreover, the union's Chief Steward later visited him in the hospital and presented him with Ms. Riley's written complaint. Hence, the first two *Loudermill* requirements were satisfied. While lacking the formalities of the City's usual predischarge proceedings, Lt. Holloway, as Chief Ford's representative, served in virtually the same capacity as Chief Ford in the standard termination proceedings. At arbitration, evidence supported the arbitrator's conclusion that Officer Brookman also served as Chief Ford's agent for the purposes of giving Buckner notice of the charges and an accounting of the evidence against him. Buckner received both oral and written notice of the charges and oral and written presentations of the evidence against him. The fact that the union representatives and Lt. Holloway may have acted pursuant to the provisions of the collective bargaining agreement or pursuant to a criminal investigation does not in any way taint the oral and written notice Bucker received, nor does it affect the fact that the charges were explained to him.

Buckner argues that the context of the investigation did not provide him with notice that his employment status was threatened by Ms. Riley's complaint against him. This argument strains credulity because Buckner's first act, upon reporting to work the day after the Riley incident, was to inquire whether the Chief Steward knew about a complaint against him. Buckner knew that he had both criminal and employment difficulties stemming from his behavior. While the charges against him were not formally presented, Buckner knew the gist of the allegations against him.

The critical element of the *Loudermill* requirements is the opportunity for the employee to respond to the employer's evidence. The chance to be heard, to present one's side of

the story , is a fundamental requirement of any fair procedural system. *See Loudermill*, 470 U.S. at 546. The opportunity to respond must be a meaningful opportunity to prevent the deprivation from occurring. *See Daniels v. Williams*, 474 U.S. 327, 338 (1986) (Stevens, J., concurring). The district court felt that the opportunity to respond to the charges afforded to Buckner was not meaningful. We disagree.

In the presence of a union representative, Lt. Holloway specifically asked Buckner to comment on the allegations made by Ms. Riley. Buckner declined to do so and was suspended with pay. When Officer Brookman visited Buckner, Buckner inquired about the charges against him and Brookman's discussions with Chief Ford regarding those charges. Buckner was not suffering from any mental or physical disability which prevented him from offering his response to the complaint.

Contrary to Buckner's assertions, *Loudermill* and pretermination due process do not require the employer to tell the employee that the employee will be terminated if no other evidence is offered to the employer. The employee, being confronted with the charges against him or her and being offered the chance to give a version of the incident, is responsible for the choice to not offer any competing evidence. *Deretich v. Office of Administrative Hearing, State of Minn.*, 798 F.2d 1147, 1150-51 (8th Cir. 1986). When an employee is faced with charges that a reasonable person would recognize as jeopardizing an employment future, extra pretermination due process obligations are not placed on the employer. Affording an employee the opportunity to respond after being confronted with the charges is all that pretermination due process requires of the employer. Here, Buckner was offered the opportunity to provide evidence which might have disuaded the City of Highland Park from terminating him for his actions in Ms. Riley's apartment. He failed to do so, and the City properly

terminated him based on the "just cause" provided by the only credible evidence in their possession.

While an interrogation does not, as a matter of law, equal a full and fair opportunity to respond to charges which jeopardize one's employment, Lt. Holloway's interrogation was clearly a part of a system which was designed to provide an initial check against a mistaken discharge. Any response made by Buckner would have clearly been communicated by Lt. Holloway to Chief Ford, who had the power to reverse a suspension. Moreover, the interrogation was held in the presence of a union representative, making it virtually the same process as the more formal routine discharge process held before Chief Ford. Consequently, the right of the employee to respond before the official in charge of the termination was offered to Buckner, who declined to take advantage of that right. *See Duchesne*, 849 F.2d at 1006.

Buckner contends that he was unable to respond to the charges because of his fifth amendment privilege against self-incrimination. He claims that the City, by refusing to offer him the protections of *Garrity v. New Jersey*, 385 U.S. 493 (1967), esssentially forced him to remain silent. In *Garrity*, the court held that confessions by public officials under a threat of removal from their positions may not be used in subsequent criminal proceedings against them. Buckner, however, was not threatened with discharge for refusing to make a statement regarding the incident at Ms. Riley's apartment. Therefore, *Garrity* does not apply to this case.

Alternatively, Buckner argues that under *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), it is unconstitutional for a government employer to terminate an employee for asserting the privilege against self-incrimination. *Lefkowitz* holds that it is unconstitutional to terminate an employee solely for invoking the privilege. Officer Buckner was not fired for assert-

ing his privilege against self-incrimination. He was fired for molesting a citizen of Highland Park, and his discharge was upheld by the arbitrator.

"[T]he state has a choice between either demanding an accounting from [the employee] on job-related matters, in which case it cannot use the statements in a criminal prosecution, or prosecuting him, in which case it cannot demand an accounting. The employer may ask 'questions specifically, directly, and narrowly relating to the performance of his official duties,' and demand an accounting even though the answers tend to incriminate." *D'Aquisto v. Washington*, 640 F.Supp. 594, 622 (N.D. Ill. 1986) (quoting *Gardner v. Broderick*, 392 U.S. 273, 278 (1968)) (other citations omitted). Thus, while the City may not use coerced answers in a criminal proceeding against the employee, it may terminate that employee for refusing to answer, so long as that termination is not solely due to the invocation of the right against self-incrimination.

Loudermill does not require that the opportunity to respond to the allegations definitely resolve the propriety of the discharge. Rather the pretermination hearing provides an initial check against mistaken terminations by the employer — an opportunity to determine if there are reasonable grounds to believe the charges against the employee are true and if they support any proposed action against that employee. *Loudermill*, 470 U.S. at 545-46. The minimal requirements of that opportunity are viewed in terms of the balance between the interests of the government and the interests of the employee. Here, the employee is a police officer charged with the protection of the citizens of Highland Park. The government interest in effective law enforcement is extremely high and the need to speedily replace public safety officers who abuse their authority is obvious. Requiring the City to provide an elaborate pretermination process hampers its "interest in quickly remov-

ing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546. In view of this strong interest, Buckner's interest in retaining his job was adequately protected by the initial procedures which indicated that a mistaken termination was not being made. Moreover, the opportunity for a post-termination proceeding under the collective bargaining agreement provided Buckner with the opportunity to challenge his termination in a more detailed fashion.[1]

We, therefore, hold that the City of Highland Park afforded Officer Buckner the minimal due process he was entitled under *Loudermill*. Consequently, the district court's grant of summary judgment to Buckner is reversed because he was not entitled to a judgment as a matter of law. Because we reverse the district court, we need not consider the district court's refusal to reconsider the summary jugment decision under Eastern District of Michigan local Rule 17(m), and we vacate Buckner's back pay award. We also vacate the award of attorney's fees to Buckner's counsel because Buckner is not a "prevailing party" in this case. *See Loudermill*, 844 F.2d at 312-13.

There being no issue of fact, the case is remanded to the district court for entry of judgment in favor of the City of Highland Park and the other defendants and the dismissal of Buckner's complaint.

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[1]The district court also relied on Act 78 of the Public Acts of 1935 as providing Buckner with extensive pretermination protections which were not utilized by the City. At the time the district court made the summary judgment determination, the court believed that Act 78 was in effect and determined the process by which Buckner should have been terminated. At the hearing on the motion for reconsideration, the court acknowledged that Act 78 did not apply to this case, but that the court's due process analysis under *Loudermill* remained unaffected. Consequently, we need not explore the court's anlysis under Act 78 because those provisions were not available to employees of the City of Highland Park at the time of the termination.

APPENDIX C

RECONSIDERATION HEARING
5-23-88

MR. HURFORD: There are multiple issues of fact, Your Honor.

And whether this Court perceives — perceive once all these issues of fact are resolved — whether the Court perceives that Mr. Buckner was treated fairly I think should be prejudged at this point in time.

There are — but we maintain, Your Honor, that he was given every opportunity to tell his side of the story and he opted not to just like the plaintiff in *Loudermill*; was given twice as long as was the plaintiff in *Loudermill;* he was advised by his union representative that termination was afoot; he was advised by Holloway that termination was afoot.

This Court relied that the oral statements made by Chief Holloway did not deny due process because those statements were oral and not written, and the Court relied upon Act 78. Under *Loudermill*, oral notice need only be given.

We submit, Your Honor, that reconsideration is appropriate, and we would request at the very least that the matter be set for trial so that at least what we perceive to be the numerous issues of fact can be resolved.

THE COURT: Thank you.

This is defendants' motion for reconsideration of the Court's findings of fact and conclusions of law in this matter which ruled in March of this year.

The motion for reconsideration is made pursuant to Rule 17(m) which provides that the movant must not only demon-

strate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from the correction thereof, and it does appear to the Court that the defendant has not met that standard, the requirement of Rule 17(m)(3).

The defendant has made this motion with the benefit of a new and different affidavit of the plaintiff's union representative which was obtained, apparently, 3 days after the Court's decision in the case and with the benefit of the arbitration hearing which has apparently now been held in the case after 4 years without hearing. The discharge was in November, 1984, and the arbitration was held after this Court's findings and conclusions were filed.

The chief points on which the defendant relies are, first of all, that the new affidavit of the union representative is slightly different from the first. I'm trying to distinguish it.

He, the union representative, apparently says that he was sent by the chief of police or that he went and discussed the plaintiff's case with him while plaintiff was lying committed with depression and alcohol abuse problems in the psychiatric ward of the hospital.

But the Court was well aware and was not misled by anything concerning the visit of the union representative. The visit of the union representative, even under the new defense affidavit which has been submitted, cannot satisfy the constitutional obligations of the employer.

If the employer asked the union representative to go and visit the plaintiff in the hospital, the union representative nevertheless could not present himself as a representative of the employer and did not do so when he spoke with the plaintiff; his obligation was to represent the plaintiff as against this employer and not represent the employer as an adverse party to the plaintiff.

His visit, therefore, and any request he might have made for explanations certainly was not made on behalf of the employer and could not pretend to the plaintiff to be an opportunity provided by the employer to respond to charges made against him to give his explanation of what he had done wrong or not wrong.

The new affidavit does not dispute the first affidavit paragraph 4 which states that it was his duty as a union officer and never as an agent of the city to contact the plaintiff, and that

> my only conversations with Chief Ford that I recall had to do with my getting the grievance form signed.

He does not dispute, either, paragraph 6 which states that even had such a request been made by management to represent the city as against the plaintiff, he would have been violating his duty as a union official and subjecting himself and the union to liability if he had presumed to represent the city and not the plaintiff city employee.

The union's visit, therefore, is of no significance in this motion. This whole aspect of the argument presents no palpable defect by which the Court would have been misled or which would have led to any different result.

The fact that the *Duchesne* decision has been vacated still leaves the *Loudermill* case as the law in this Circuit and the Court must rely upon it and continues to do so and stands on its first ruling on that basis.

The Court was unaware until this motion was filed that Act 78 did not apply to the city's motion that I denied in part, and I thought I was clarifying that when I asked the parties to brief the matter, but the defendant withheld the information from the Court apparently that he was aware that Act 78 did not apply to the City of Highland Park.

The Court did in fact rely in part upon it, but there is *Loudermill* and the requirements of *Loudermill* do back up the requirements of Act 78, and the property right to a job is undisputed, apparently, although the property right granted by the collective bargaining agreement is different from that on which the Court thought it was relying in Act 78. But inasmuch as the property right is not disputed, it still is in existence as far as the Court is concerned and relied upon by the Court.

So, for those reasons, the motion is denied at this time. The Court will stand on its initial findings of fact and conclusions of law.

Now you have some more motions here.

MR. BENJAMIN. Your Honor, there were 2 motions filed by myself, and I'm not sure what to do with them at this point. One was for attorney's fees and costs, and Mr. Hurford's raised some factual issues with regard to them. In the meantime he filed his rehearing motion, and I suspect in part for that reason I hadn't tried to discuss with him whether there was any way we could make compromises on that and then come —

THE COURT: Well, then let's reset that because you'll have to prepare your affidavit — do you have affidavits here with you, supporting —

MR. BENJAMIN: I believe I filed one of my own, Yes.

And the other was to enter judgment, and again Mr. Hurford has raised at least 1 thing which I think is clearly * * *

* * * * * *

(2)

No. 90-67

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAY C. BUCKNER,
Petitioner,

vs.

CITY OF HIGHLAND PARK; HIGHLAND PARK POLICE DEPARTMENT; ROBERT BLACKWELL, TERRY FORD, Chief of Police; and JOHN HOLLOWAY, Lieutenant, Jointly and Severally,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THERE EXISTS A CONFLICT BETWEEN *GARRITY* v. *NEW JERSEY*, 385 U.S. 493, 17 L.Ed 2d 562, 87 S. Ct. 616 (1967), AND *CLEVELAND BOARD OF EDUCATION* v. *LOUDERMILL*, 470 U.S. 532, 84 L.Ed 2d 494, 105 S. Ct. 1487 (1985)?

II . WHETHER THIS COURT SHOULD REVIEW THE COURT OF APPEALS' LEGAL DETERMINATION THAT THE REQUIREMENTS OF *LOUDERMILL* WERE MET WHEN PLAINTIFF, AFTER BEING PROVIDED WITH A COPY OF THE CHARGES AGAINST HIM, WAS ASKED IF HE WANTED TO RESPOND; HAD EIGHT FULL DAYS AFTER THAT INITIAL OPPORTUNITY IN WHICH TO RESPOND; AND DECLINED TO FILE A WRITTEN GRIEVANCE OR ASK FOR A MEETING WITH HIS SUPERVISORS WHEN APPROACHED BY HIS UNION REPRESENTATIVE?

III. WHETHER THIS COURT SHOULD EXPAND THE TRIPARITE ANALYSIS *LOUDERMILL* ESTABLISHED FOR PRE-TERMINATION DUE PROCESS TO ADOPT A NEBULOUS "BALANCING OF INTERESTS" TEST BASED ON AN EMPLOYEE'S LENGTH OF SERVICE WITH A PUBLIC EMPLOYER?

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The district court's Memorandum Opinion and Order is published at 681 F. Supp. 1256 (E.D. Mich. 1988). The court of appeals' decision is published at 901 F.2d 491 (6th Cir. 1990).

STATEMENT OF THE CASE

A. The Incident

Plaintiff Ray Buckner was a detective in the employ of the Highland Park Police Department.[1] In that capacity, Plaintiff was dispatched to the home of Letit Riley on November 6, 1984, who had filed a complaint against an individual in connection with a shooting incident. Plaintiff was responsible for the investigation of that complaint.

On his first visit to Ms. Riley's home, Plaintiff advised Ms. Riley that he failed to bring the proper forms for recording her statement. He informed Ms. Riley that he would return the following day. Plaintiff returned to Ms. Riley's apartment on November 7, 1984, at approximately 8:30 p.m., four hours after the end of his shift.[2]

Plaintiff gave Ms. Riley a witness complaint form to complete. As she was writing out her statement, he commented upon Ms. Riley's appearance, and began to question her sexual activities.

Then, as Ms. Riley stated:

> . . . I went back to write on the paper, Buckner reached out his right hand and put it up under my arm, grabbing — he was trying to grab my arm. Then he let go of my arm and I

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[1] The City of Highland Park is a municipal corporation incorporated under the provisions of the State of Michigan's Home Rule Cities Act, MCL §117.1 *et. seq.* None of the other Defendants are corporations or subsidiaries of corporations.

[2] Plaintiff could not recall the exact time of his arrival as he claimed he was too drunk.

> pulled away, and he rubbed his hands up against my breast. . . . When I looked back down to the paper to write again, he reached out his right hand and grabbed my head and was pulling my head toward him.

Ms. Riley demanded that Plaintiff leave her apartment, but he refused. Fortunately, she then received a telephone call from a friend, Mr. Lawrence Bohler. Plaintiff told Ms. Riley to have the person on the phone call later. Ms. Riley refused, put the receiver down and again asked Plaintiff to leave. Mr. Bohler could hear Plaintiff and Ms. Riley arguing as she repeatedly asked Plaintiff to leave. Finally, she was able to push Plaintiff out the door. After Ms. Riley told Mr. Bohler of the incident, he immediately telephoned the Highland Park Police Department to complain of Buckner's conduct.

B. Commencement of the Investigation

Immediately following the receipt of Mr. Bohler's complaint, the Chief of the Highland Park Police Department, William Ford, and the Lieutenant in charge of the Detective Bureau, John Holloway, were notified. Chief Ford and Lieutenant Holloway immediately proceeded to Ms. Riley's apartment and began an investigation into the complaint of Buckner's sexual misconduct. In addition to filing a complaint against Buckner, both Ms. Riley and Mr. Bohler gave written statements to Chief Ford on the evening of November 7, 1984.

C. Plaintiff's Knowledge of the Complaint

Plaintiff learned of Ms. Riley's complaint during the early morning hours of November 8, 1984, when he was contacted at his home by a friend, Detective Czarnecki, another Highland Park detective. After reporting to work in the morning of November 8, 1984, Plaintiff advised a fellow officer, Larry Robinson, about his assault of Ms. Riley. He told Robinson that he had done something the night before that he should not have done and that he was in trouble. When Robinson inquired further, Plaintiff stated, he had "messed with a woman." Later in the afternoon on November 8, 1984, after confirming that an official complaint for

sexual assault had been filed against him, and knowing that Chief Ford wanted to discuss the incident, Plaintiff opted to admit himself to Henry Ford Hospital for the claimed purpose of obtaining treatment for alcohol abuse. Plaintiff's medical records reveal, however, that he was never diagnosed as an alcoholic.[3]

D. Lieutenant Holloway's Visit to the Hospital

At approximately 6:30 p.m. on November 8, 1984, Lieutenant Holloway went to Henry Ford Hospital to interview Plaintiff.[4] To protect Plaintiff's rights under his Union's Collective Bargaining Agreement, Lieutenant Holloway also took Union Representative Officer Yopp to the hospital.[5] Before Lieutenant Holloway even began to question Plaintiff, Holloway permitted Plaintiff to consult in private with the union representative. Lieutenant Holloway then informed Plaintiff of the charges against him and asked for Plaintiff's version of what had happened at Ms. Riley's home. Upon the advice of Officer Yopp, however, Plaintiff refused to give his version of the events or otherwise to make any other statement. He was then provided the opportunity to read the complaint filed by Ms. Riley, but still refused to offer any explanation.

Lieutenant Holloway then suspended Plaintiff with pay, pending a further investigation of the charges. He once again asked Plaintiff if he had anything to say, but Plaintiff still refused to respond to the charges against him.

E. Officer Brookman's Visit to the Hospital

When Lieutenant Holloway was unable to obtain a statement from Plaintiff, Chief Ford requested that the Union President,

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[3] Testimony at Plaintiff's post-termination arbitration hearing revealed that Plaintiff's admitting diagnosis was actually "depression."

[4] Lieutenant Holloway indicated that the incident had the potential to result in criminal charges being filed against Plaintiff.

[5] Yopp's sole reason to be present was to provide Plaintiff with union representation during a disciplinary interview. *N.L.R.B.* v. *Weingarten*, 420 U.S. 251; 43 L.Ed 2d 171; 95 S. Ct. 959 (1975).

Officer Charles Brookman, advise Plaintiff of the charges against him and obtain his account of Ms. Riley's assault. Chief Ford also informed Officer Brookman of his intent to discipline Plaintiff.[6] Before November 15, 1984, Officer Brookman visited Plaintiff at the hospital in an attempt to obtain a statement, but Plaintiff still refused to make any statement about Ms. Riley's charges. Officer Brookman returned to the Police Department and informed Chief Ford that Plaintiff once again had refused to relate his version of the incident.

F. The Discharge

On November 15, 1984, following eight days of investigation and Plaintiff's continued refusal to relate whatever his side of the story might be, Chief Ford made a preliminary determination and recommended Plaintiff's discharge to Highland Park Mayor Robert Blackwell. Mayor Blackwell approved the discharge. A copy of the discharge recommendation was given to Officer Brookman in accord with the standard procedure of the Department.

G. The Grievance

It was not until he filed a written grievance, on November 29, 1984, challenging his suspension on November 8th and his

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[6] In the district court's opinion granting summary judgment to Plaintiff on the due process claim, the district court relied upon the affidavit of Officer Brookman which had been secured by Plaintiff's counsel. In particular, the district court accepted the affidavit of Officer Brookman and ignored the deposition testimony of William Ford who testified that before Plaintiff's discharge, he had advised Brookman of his intent to discipline Plaintiff and had sent Brookman to obtain Plaintiff's version of the Riley incident. The Brookman affidavit, which the district court credited, stated that Ford had never made such a directive. It further stated that Brookman did not visit Plaintiff in the hospital until after his discharge. But Brookman testified to the contrary at the post-termination arbitration hearing. At the time that Defendants sought a rehearing of the court's decision, they demonstrated that Officer Brookman's affidavit had been secured under the most questionable circumstances. Brookman told Plaintiff's counsel of the inaccuracy of several of the statements and was assured that they would be changed before it was filed. However, nothing was changed. Defendants filed an accurate Brookman affidavit which the district court simply ignored.

subsequent termination on November 16, 1984, that Plaintiff expressed any position. He filed the grievance pursuant to the grievance procedure contained in the Collective Bargaining Agreement between the City of Highland Park and the Highland Park Police Officers Association.[7] In that grievance, Plaintiff filed a general denial of the allegations contained in Chief Ford's termination letter. He also claimed that the City failed to provide him with procedural due process in discharging him.[8]

H. The Lawsuit

On March 10, 1986, Plaintiff filed a complaint alleging his discharge was in violation of his due process rights because no hearing was held before his termination. After a hearing on the parties' cross motions for summary judgment, the district court issued an Order on May 26, 1987, denying both parties' motions on the due process claim.

On June 26, 1987, the district court *sua sponte* ordered the parties to rebrief and reargue their motions for summary judgment on the due process claim "in light of the Sixth Circuit's recent opinion in *Duchesne* v. *Williams, et al.*, slip opinion No. 86-1017 (June 16, 1987)" [821 F.2d 1234 (6th Cir. 1987) *vacated* August 4, 1987]. The court also asked the parties "to specifically address the unresolved issue of the source of Plaintiff's alleged property right in his employment which would implicate the due process requirements of *Cleveland Bd. of Education* v. *Loudermill*, 470 U.S. 532 (1985)."

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[7] The grievance procedure, which contains five separate steps culminating in final and binding arbitration, was a mechanism available to Plaintiff and other Union members to obtain redress from alleged violations of the Collective Bargaining Agreement. One provision of the Agreement provided that employees, such as the Plaintiff, could not be disciplined or discharged without just cause.

[8] Plaintiff has never disputed that although he was given several opportunities to make a statement about the complaint filed by Letit Riley, he refused to do so upon all occasions. Plaintiff also admits that it was the sworn duty of police officers to uphold the law and the rights of citizens. He agreed that making sexual advances toward a complaining witness is a serious offense and grounds for termination.

I. The District Court's Opinion

After considering the parties' briefs and arguments, the district court found that Plaintiff had a property interest in his continued employment with the Highland Park Police Department (although, for purposes of the motion, Defendants did not dispute the existence of that interest). Relying on *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 84 L.Ed 2d 494, 105 S. Ct. 1487 (1985), it held that one of the sources of that interest was the Michigan Civil Service Act governing police and fire personnel, MCL §38.501 *et. seq.*, PA 78 ("Act 78"). Then, notwithstanding its acknowledgement that Lieutenant Holloway and Officer Yopp visited Plaintiff on November 8, 1984, and that Lieutenant Holloway had asked Plaintiff to give his account of the incident, the district court found the pretermination procedures provided to Plaintiff failed to satisfy the minimal constitutional requirements of the due process clause. In making this finding, the district court relied, in part, upon Act 78, despite the recognition by both the City of Highland Park and the Union representing Plaintiff that Act 78 did not even apply to the City's police and fire departments.

The court also awarded Plaintiff back pay from November 16, 1984, on the basis of the court of appeals' opinion in *Duchesne* v. *Williams*, 821 F.2d 1234 (6th Cir. 1987), even though that opinion had already been vacated by the court of appeals. The district court was particularly persuaded by the original, now vacated, opinion in *Duchesne*, because of what it perceived to be the similarities between the two actions.[9]

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[9] In *Duchesne*, the plaintiff, a public employee, claimed he had been denied due process in his termination because although he had a hearing, it was before the supervisor who discharged him, not an impartial decisionmaker. The court of appeals disagreed and held that *Loudermill* requires only the availability of a right to respond and nothing more. *Duchesne* v. *Williams*, 849 F.2d 1004 (6th Cir. 1988).

J. The Arbitrator's Decision

In the meantime, on January 5, 8, and 13, 1988, following multiple adjournments, an arbitration hearing was held upon the Plaintiff's grievance. Following extensive testimony and the submission of post-hearing briefs by the parties, Arbitrator Jerome H. Brooks issued a decision on April 28, 1988, finding that the City had discharged Plaintiff with just cause and denying Plaintiff's grievance.

The Arbitrator expressly considered and rejected the very arguments adopted by the district court. As stated by the Arbitrator:

> If under all the circumstances, [Plaintiff] was given notice of the accusations and evidence against him, *Loudermill* was satisfied no matter how informal the notice was to [Plaintiff]. Inspector Holloway, in his capacity as the City's agent, visited [Plaintiff] at Ford Hospital in the very early evening of November 8, 1984. [Plaintiff] was aware by that time that LR [Letit Riley] had filed a complaint against him and that a warrant against him was being sought. Indeed, a reasonable inference arises . . . that the precipitous nature of [Plaintiff's] decision to seek admittance to Ford Hospital on November 8 is attributable, at least in part, to his knowledge that he was in trouble because of the events in LR's apartment on November 7.
>
> At the hospital, Holloway officially informed [Plaintiff] that LR had made a complaint against him and that a warrant was being pursued. During his cross-examination, [Plaintiff] admitted not only this, but also that Holloway showed him LR's complaint against him, and that he read it. This document detailed the evidence the City possessed that Grievant had engaged in wrongdoing.
>
> Holloway read [Plaintiff] his *Miranda* rights and placed him on notice that the City intended to proceed criminally against him. However, it was unmistakable that [Plaintiff] was put on notice at the same time that the City was

pursuing disciplinary as well as criminal action against him. It was because of the potential affect on [Plaintiff's] employment status that the City arranged for his Union representative to be present during the meeting with Holloway. It should be remembered that Holloway indefinitely suspended [Plaintiff] during this visit and relieved him of his badge and weapon. Suspension signified that the City was pursuing disciplinary action against him. In my judgment as the result of Holloway's visit to the hospital, [Plaintiff] was aware of the gist of the charges against him and the evidence supporting them.

* * *

I conclude, on the basis of Holloway's meeting with [Plaintiff] on November 8 and Ford's fruitless efforts to arrange for a "hearing" of the type usually held with a Highland Park Police Officer and his Union representative when discipline is contemplated, that Grievant was informally apprised of the nature of the contemplated charges against him and the evidence supporting the charges, and had the opportunity to be heard before Chief Ford on all aspects of the matter.

K. The Court of Appeals' Decision

The Sixth Circuit Court of Appeals considered *de novo* the district court's award of summary judgment for Plaintiff under the standard for awarding summary judgment established in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 91 L.Ed 2d 265, 106 S. Ct. 2548 (1986). The court of appeals reversed the district court's award of summary judgment for Plaintiff and vacated the award of back pay and attorney fees to him. *Buckner* v. *City of Highland Park*, 901 F.2d 491 (6th Cir. 1990). Instead, the court of appeals entered summary judgment for Defendants, holding that there was no genuine issue of material fact that Plaintiff was afforded the due process required under the *Loudermill* standard. 901 F.2d at 497.

The court of appeals held that the first two elements of *Loudermill* — notice of the pending charges and an explanation of the evidence against him — were met when Lt. Holloway presented Ms. Riley's complaint to Plaintiff to read. 901 F.2d at 495. The court of appeals held that the sole remaining issue under *Loudermill* was whether Plaintiff had been provided with an opportunity to respond to the charges against him. *Id.* Noting that the district court had ruled that union representative Brookman's visit to Plaintiff did not qualify as an adequate opportunity to respond, the court of appeals held that there was no genuine issue of fact to resolve because, as a matter of law, Lt. Holloway's initial interview afforded Plaintiff an adequate opportunity to respond. 901 F.2d at 494-95. The court of appeals reasoned that Brookman's visit merely offered Plaintiff another such opportunity. The court of appeals concluded that under *Loudermill*, the opportunity for a pre-termination hearing is only an initial check against an incorrect decision and that Plaintiff had received adequate pre-termination due process. *Id.*

SUMMARY OF THE ARGUMENT

Plaintiff's Petition for Writ of Certiorari must be denied by this Court because he has failed to meet any of the reasons described in Sup. Ct. R. 10.1 for granting such a petition. Plaintiff has not raised any argument that the court of appeals' decision conflicts with another decision by a federal appellate court or a state supreme court, or that the court of appeals made a significant procedural error during its deliberations. Sup. Ct. R. 10.1(a). In his Petition, Plaintiff has limited the purported basis for this Court to issue a writ of certiorari to Sup. Ct. R. 10.1(c), because of an alleged conflict between this Court's holdings in *Loudermill* and *Garrity* v. *New Jersey*, 385 U.S. 493, 17 L.Ed 2d 562, 87 S. Ct. 616 (1967) and a purported defect in the court of appeals' legal determination that Defendants had provided Plaintiff with the pre-termination due process required by

Loudermill.[10] Plaintiff also asserts, under Sup. Ct. R. 10.1(c), that this Court should consider expanding the *Loudermill* pre-termination analysis to include an unworkable, nebulous "balancing of interest" test based on an employee's years of service with the public employer. Because none of these arguments meet the criteria of Sup. Ct. R. 10.1(c), Plaintiff's Petition must be denied.

Loudermill clearly delineated the three elements of due process which must be afforded a public employee who has a property interest in his job. These elements are: (1) written or oral notice of the charges pending against him; (2) a brief presentation of the evidence discovered against him; and (3) an opportunity to respond to those charges. Plaintiff's Petition for Writ of Certiorari does not raise any significant issues under *Loudermill* which this Court must address. No conflict between different federal courts of appeals or between a state supreme court and a federal court of appeals over the interpretation of *Loudermill* has been cited by Plaintiff in his Petition for Writ of Certiorari. Plaintiff only argues that his Petition should be granted because of an alleged conflict between *Loudermill* and *Garrity* and because of his assertion that the court of appeals incorrectly interpreted *Loudermill*. In his Petition, Plaintiff has not cited to any precedent which adopts the position that these two cases are in conflict.

As correctly noted by the court of appeals, *Garrity* is inapplicable to the instant case and therefore, is not in conflict with *Loudermill*. *Garrity* establishes that a public employee may not be terminated for refusing to answer questions during a criminal investigation if those questions might incriminate him. No assertion is made in the instant case that Plaintiff was terminated for refusing to answer Lt. Holloway's questions or that he was threatened with termination if he failed to respond. Further,

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[10] S. Ct. 10.1(b), which governs review of decisions of a state supreme court, is inapplicable to the instant case.

Loudermill protects a public employee by affording him the opportunity, if he so chooses, to respond to the charges against him. *Garrity* and *Loudermill* are not in conflict — rather, they provide distinct protections to the public sector employee.

The court of appeals, in correcting the district court's errors of law, appropriately applied the three-part *Loudermill* test. No dispute exists that Plaintiff, a sworn police officer, read a written complaint filed by a woman whom he had sexually molested. Plaintiff was given the opportunity to respond to those charges by a management official, Lt. Holloway, and voluntarily elected not to take that opportunity to respond. After Lt. Holloway's visit, Plaintiff had eight days prior to his termination to respond to those charges, but elected not to do so until after his termination. He had an additional opportunity to respond to the complaint when he was visited by his union representative, Officer Brookman, who was sent by Chief Ford to solicit a union grievance. The court of appeals correctly determined that Plaintiff had been afforded the "minimal due process" *Loudermill* requires for a pre-termination hearing. Review of the court of appeals' decision is not warranted because that decision fully complies with *Loudermill.*

There is also no basis for this Court to grant Plaintiff's Petition to consider his self-serving proposal that the Court adopt a "balancing of interest" test to be added to *Loudermill's* tripartite analysis. While Plaintiff's proposal that high seniority public employees be given "more" pre-determination due process than junior public employees may serve his interests for this isolated matter, such a sliding scale is unsupported by constitutional precedent and would wreak havoc for lower courts and public employers who would have to apply such an ambiguous test. *Loudermill* has already established a workable three-part standard to apply to public employees who have a property interest in their employment. No reason exists in this matter for the Court to expand the *Loudermill* pre-termination test.

ARGUMENT

The sole issue before this Court is whether a Writ o. Certiorari should be granted to review the court of appeals' application of the due process requirements set forth in *Loudermill* to the undisputed facts of the instant case. Sup. Ct. R. 10.1(c). *Loudermill* clearly sets forth the three-part standard for the due process requirements for the pre-termination process applied to a public sector employee who has a property interest in his job: (1) the employee must receive written or oral notice of the charges pending against him; (2) he must be presented with a description of the evidence against him; and (3) he must be given an opportunity to respond to those charges. 470 U.S. at 546. In the instant case, the court of appeals correctly reversed the district court's errors of law and held that Defendants had afforded Plaintiff all the pre-termination due process to which he was entitled.

In its Petition for a Writ of Certiorari, Plaintiff only cites three reasons for its Petition to be granted. First, Plaintiff argues that the *Loudermill* due process requirements conflict with the constitutional protections afforded to public sector employees who are the subject of a criminal investigation, as delineated in *Garrity*. Second, Plaintiff argues the court of appeals erred in its application of the *Loudermill* standards to the undisputed facts of the instant case. Third, Plaintiff argues that this Court should expand the *Loudermill* pre-termination due process requirements for high seniority public employees. Significantly, Plaintiff does not raise *any* conflict in decisions between various federal courts of appeal or between a federal court of appeals and a state supreme court. Further, Plaintiff has not argued that the court of appeals made any procedural errors in rendering its decision. As the court of appeals correctly noted, *Garrity* is inapplicable to the instant case, and does not conflict with *Loudermill* because the court of appeals did not err in its application of *Loudermill*. Plaintiff's proposal for expanding the pre-termination due process requirements is unsupported by constitutional precedent or legitimate policy concerns. Plaintiff's Petition for Writ of Certiorari must be rejected.

I. There Is No Conflict Between This Court's Decisions In *Garrity* And *Loudermill* And Therefore No Review Of That Issue Is Warranted.

Petitioner asserts that this Court should grant its Petition for Writ of Certiorari to resolve a purported conflict between this Court's decisions in *Garrity* and *Loudermill*. However, because these decisions are not in conflict, review of the instant case is not warranted.

In *Garrity*, several police officers were being investigated about an allegation that they had fixed traffic tickets. 385 U.S. at 494. In accordance with a state statute, the police officers were advised that: (1) any statement made by them could be used against them in a criminal proceeding; (2) that they could refuse to answer questions, if answering those questions would tend to incriminate them; but (3) they would be terminated if they refused to answer the investigator's questions. 385 U.S. at 494. Forced with a choice between losing their jobs and possible incrimination, the police officers responded to the investigator's questions and were subsequently convicted of criminal charges, in part due to the statements they made to the investigator. 385 U.S. at 494-96. This Court invalidated the state statute, holding that the Fourteenth Amendment prohibited the use of statements made by a public employee in criminal proceedings against him where his statements were obtained under the threat of termination if he refused to answer the interrogator's questions. 385 U.S. at 499.

Thus, as noted by the court of appeals in its decision in the instant case, *Garrity* merely prohibits a public employer from terminating an employee for refusing to cooperate with a criminal investigation. 385 U.S. at 499; 901 F.2d at 496. There is also no dispute that after Lt. Holloway advised Plaintiff of his right to remain silent under *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694; 86 S. Ct. 1602 (1966), Plaintiff voluntarily elected to invoke that right. Defendants clearly had the right to seek an accounting from Plaintiff about his actions towards Ms. Riley. *Gardner* v. *Broderick*, 392 U.S. 273, 277, 20 L.Ed 2d 1082, 88 S.

Ct. 1913 (1968); *D'Acquisto* v. *Washington*, 640 F. Supp. 594, 622 (N.D. Ill. 1986).

While *Garrity* prohibits statements coerced by the threat of employment termination, *Loudermill* deals with an entirely different issue — the opportunity of a public employee prior to termination, if he so chooses, to respond to charges (including criminal charges) against him. 470 U.S. at 532. In *Loudermill*, this Court held that a public employee who has a property interest in his job must be afforded "minimal due process" prior to his termination. 470 U.S. at 545. To meet this minimal requirement, the public employee must be given: (1) written or oral notice of the charges against him; (2) a brief description of the evidence against him; and (3) an opportunity to respond to those charges. 470 U.S. at 546. *Loudermill*, as does *Garrity*, does not require the public employee to respond to criminal charges against him, but instead preserves the *option* for the employee to respond to those charges. Under *Loudermill*, an employee who elects not to respond, forces the employer to make a decision about termination without the employee's input and thus risks the employer making an "erroneous decision." 470 U.S. at 545; *Deretich* v. *Office of Administrative Hearing*, 798 F.2d 1147, 1150-51 (8th Cir. 1986) (an employee who chooses not to respond when offered the opportunity to do so, is responsible for the consequences of that choice). It is well-settled that the fact that Plaintiff failed to take advantage of the opportunity to respond does not give rise to a due process violation. *See Gniotek* v. *City of Philadelphia*, 808 F.2d 241 (3rd Cir. 1986), *cert. den.*, 481 U.S. 1050; 95 L.Ed 2d 839; 107 S. Ct. 2183 (1987); (police officers who elected to take their Fifth Amendment privilege after receiving *Miranda* warnings were given adequate pre-termination due process); *Darnell* v. *Dept. of Transp.*, 807 F.2d 943, 945 (Fed. Civ. 1986) (*Loudermill* only requires an opportunity to present the employee's story, not a guarantee of a presentation of facts); *Riggins* v. *Bd. of Regents*, 790 F.2d 707, 711-12 (8th Cir. 1986) (employee's voluntary choice not to follow an established grievance procedure does not create a due process violation by the employer); *Willoughby* v. *Village of Dexter*, 709 F. Supp. 781,

786 (E.D. Mich. 1989) (due process was afforded to a public employee who voluntarily elected not to testify at a pre-termination hearing); *D'Acquisto* v. *Washington*, 640 F. Supp. 594, 623 (N.D. Ill. 1986) (in evaluating police officers' decisions to remain silent under *Miranda*, the court held that "putting the individual to the choice between his opportunity to be heard and his privilege against self-incrimination is not an impermissible burden on his Fifth Amendment rights"); *Williams* v. *Seattle*, 607 F.Supp. 714, 721 (D.C. Wash. 1985) (police officer's failure to respond to a notice of pending discipline afforded him an adequate opportunity to respond).

As noted by the court of appeals, there is no allegation, as existed in *Garrity*, that Plaintiff was required to either respond to the police department's investigation or be terminated. 901 F.2d at 494. To the contrary, Plaintiff's decision to remain silent left the employer with the decision on whether to proceed on either criminal charges or employment termination proceedings, or both, based solely on the evidence it could obtain through its own efforts. No inherent conflict existed in the instant case in Defendants' application of the principles enunciated in *Garrity* and *Loudermill.*

In his Petition, Plaintiff does not cite to any precedent which holds that *Garrity* and *Loudermill* are in conflict, or that demonstrates that any lower court has had to balance the distinct constitutional protections afforded under those two decisions. Despite the arguments Plaintiff made to the courts below, the court of appeals held that *Garrity* is inapplicable to the instant case and the district court did not rest any part of its decision on *Garrity*. Plaintiff has not demonstrated, and Defendants are unaware of, any decision in conflict with the court of appeals' analysis of *Garrity* and *Loudermill.*

Plaintiff requests that this Court grant his Petition to consider a new rule which would allow a public employee to preserve his right to a *Loudermill* pre-termination hearing while a criminal investigation is pending. Such a rule would lead to an absurd result. Under Plaintiff's proposition, two police officers who face

potential termination on the same day, but for different reasons, would be treated differently. An employee who was faced with potential termination for excessive tardiness would receive no additional protection, while a co-worker, who is charged with aggravated assault and first-degree murder could not be removed from the public payroll until all criminal charges, including appeals, were resolved. Such a result is nonsensical and must not be entertained by the Court.

Because, as the court of appeals correctly noted, *Garrity* is inapplicable to the instant case, and because *Loudermill* does not conflict with *Garrity*, no review of this issue by this Court is warranted.

II. The Court Of Appeals Correctly Held That Plaintiff Was Given A Meaningful Opportunity To Respond To The Charges Levied Against Him.

The court of appeals correctly held that Plaintiff had a meaningful opportunity to respond to Riley's complaint and thus its decision is completely consistent with *Loudermill*.

Plaintiff was not in a "psychiatric ward" as suggested in his Petition and his subsequent entry into an Alcoholics Anonymous program after his termination is irrelevant. The court of appeals correctly held that Plaintiff had voluntarily admitted himself to the hospital, but that he was not diagnosed as suffering from alcohol abuse. 901 F.2d at 494. There is no allegation by Plaintiff, or any finding by either the district court or court of appeals to suggest that Plaintiff was inebriated either during Lt. Holloway's or Brookman's visits, was unaware of the charges against him, or was incapable of responding to the charges during the eight-day hiatus between Holloway's visit on November 8, 1984 and Mayor Blackwood's decision on November 15, 1984 to terminate him. The court of appeals correctly held that Plaintiff had a meaningful "opportunity to present reasons, either in person or in writing, [why] departmental discipline should not be taken." 470 U.S. at 546.

III. The Court Of Appeals Correctly Applied The *Loudermill* Analysis, Which Does Not Include A "Balancing of Interests" Test.

Plaintiff argues that his Petition be granted because he believes that the court of appeals erred in its application of *Loudermill* by failing to apply a "weighing test." *Loudermill*, however, does not require a "weighing test," but only an analysis of whether the three elements of pre-termination due process were met: (1) oral or written notice of the charges against the public employee; (2) a brief description of the evidence against him; and (3) an opportunity to respond to those charges. 470 U.S. at 546.

The court of appeals correctly applied this three-part test. The court of appeals held, and Plaintiff does not contest, that there was no dispute that the first two elements were met. 901 F.2d at 495. The court of appeals correctly noted that Plaintiff was given a copy of the complaint Riley filed against him and was told by Lt. Holloway that the police department was investigating that complaint. Plaintiff does not dispute this fact. Therefore, the sole issue is whether Plaintiff was given an opportunity to respond to the complaint. The court of appeals correctly applied the *Loudermill* principles by holding that Plaintiff had the opportunity to respond directly to Lt. Holloway, to file a grievance with union representative Brookman, or to contact the police department at any time during the eight days he was on suspension. 901 F.2d at 495-96.

The "weighing test" urged by Petitioner, does not apply to the analysis the court of appeals should have followed, but only to this Court's *rationale* for delineating the three required elements of pre-termination due process for a public employee. 470 U.S. at 544-45; *Gniotek*, 808 F.2d at 245.

Loudermill does not differentiate, as urged by Petitioner, between levels of the public employer's property interest. A police officer with twenty years of service, such as Plaintiff, does not have a "stronger" property interest than a police officer with two

years of service. *Loudermill* provides that the pre-termination hearing need not be "elaborate" and its sole purpose is to serve as an initial check against an erroneous decision. 470 U.S. at 543, 545. *Loudermill* does not require "more" pre-termination due process to be given to Plaintiff because of his years of service, only that he receive the minimal three elements of pre-termination due process. 470 U.S. at 546.

There has never been a dispute in this litigation that Plaintiff, by virtue of the Collective Bargaining Agreement which established the terms and conditions of his employment, had a property interest in his job. Further, the police department acted in accordance with *Loudermill's* suggestion of suspending a public employee who represents a "significant hazard" if retained on the job, by suspending him with pay while it continued its investigation and waiting for Plaintiff to respond to Riley's complaint. 470 U.S. at 544. Plaintiff was terminated only after he was afforded eight days to respond to Riley's complaint, which gave him an ample opportunity to respond.

Plaintiff has not cited to, and Defendants are unaware of, any constitutional precedent where individuals are afforded different levels of protection for the same constitutional right based upon the varying attributes of those individuals. While granting Plaintiff "more" due process protection, on a retroactive basis, because of his twenty years of service may conveniently serve Plaintiff's selfish interests, such a nebulous standard would prove unworkable for the lower courts and public employers to interpret and administer. Unlike the "bright line" three-part test already established in *Loudermill*, a "sliding scale" of increasing due process, based upon an employee's years of service, does not readily lend itself to an easily understood, national standard. There is no basis, either under a policy consideration or constitutional precedent, for this Court to consider the adoption of such an inherently problem-laden standard.

IV. The Court Of Appeals Correctly Held That Union Agent Brookman's Visit With Plaintiff Met The *Loudermill* Due Process Requirements.

Plaintiff also asserts its Petition should be granted because it argues that the court of appeals erred in holding that Defendants met their due process requirements by directing union representative Brookman to visit Plaintiff and solicit a grievance.

The court of appeals correctly held that Brookman's attempt to solicit a grievance or otherwise advise Plaintiff that he should respond to the charges Riley made against him, at least in part, met Defendants' due process requirements. Brookman's solicitation of a grievance did provide Plaintiff with an opportunity to respond to the charges against him — that is precisely the purpose of a union grievance.

Plaintiff's assertion that "grievances are notoriously brief" is nonsensical, not only because there is no evidence on the record that Plaintiff was limited in the length of the grievance he could file, but because, in practice, grievances do vary in length and detail. F. Elkouri & E. Elkouri, *How Arbitration Works*, 4th ed. 153-175 (1985). Brookman had a duty, on behalf of the union, to adequately represent Plaintiff in the investigation and preparation of the grievance. *Vaca* v. *Sipes*, 386 U.S. 171, 177, 191; 17 L.Ed 2d 842; 87 S. Ct. 903 (1967). Plaintiff could have, but chose not to, responded to Riley's complaint by filing a grievance over his suspension.

Further, the court of appeals correctly interpreted *Loudermill* in holding that Lt. Holloway's meeting with Plaintiff in the presence of union agent Yopp, *alone* met the minimal due process requirements. 901 F.2d at 495. Brookman's visit merely gave Plaintiff a "second bite" at the "opportunity to respond" apple. Thus, whether Brookman's visit afforded Plaintiff an opportunity to respond is irrelevant to the ultimate disposition of this case because Plaintiff had an opportunity to respond either directly to Lt. Holloway or at any time during the eight days before his termination by Mayor Blackwood.

In reaching its conclusion that Plaintiff had an opportunity to respond, the court of appeals correctly dismissed Plaintiff's unsupported argument that he was incapable of responding:

> When Officer Brookman visited Buckner [Plaintiff], [Plaintiff] inquired about the charges against him and Brookman's discussions with Chief Ford regarding those charges. Plaintiff was not suffering from any mental or physical disability which prevented him from offering his response to the Complaint.

901 F.2d at 495.

This Court need not decide which party Brookman was acting for when he met with Plaintiff to solicit a grievance. Regardless of whether Brookman was acting as the City's agent or as Plaintiff's agent as a union representative, the court of appeals correctly held, under *Loudermill*, that when a union representative advises a public employee that charges are pending against him and provides him an opportunity to respond, either through the solicitation of a grievance or any other means, the minimal pre-termination due process requirements of *Loudermill* are met.

The nature of Brookman's visit to Plaintiff does not warrant review of this litigation by this Court, because the court of appeals did not commit legal error. Even if Brookman's visit is disregarded in the due process analysis, Plaintiff was afforded adequate pre-termination due process.

CONCLUSION

Because this Petition involves neither questions which should be, but have not, been settled by this Court, or an appellate court decision in conflict with this Court's decision in *Loudermill*, the Court should decline to issue a Writ of Certiorari.

Respectfully submitted,

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